Supreme Court, U.S.
FILED

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No. _____.

In The
Supreme Court of the United States

October Term 1998

EDWARD M. CONK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

Pro Se
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21pp

QUESTIONS PRESENTED

I. Whether the government was required by law to turn over to defendant(s) evidence, exculpatory or not.

II. Whether the lower court erred by not enforcing the subpoena granted for said evidence, once the court was made aware that the evidence was not in the courtroom.

III. What is the proper standard in Federal Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, when the jury relies on documents that were not placed into evidence, for conviction of guilt or innocence.

IV. Does the law require a summary exhibit's supporting documents to be in evidence.

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TABLE OF AUTHORITIES CITED

Bell v. State, 57 Md. 108, 120.
Beard v. State, 71 Md. 275, 280, 17 A. 1044, 1045;
Brady v. Maryland, 373 U.S. 83 (1963) *passim*
Dick v. State, 107 Md. 11, 21, 68 A. 286, 290. Cf.
Kyles, 514 U.S. at 441;
Naupe v. Illinois, 360 U.S. 264, 269 (1959).
Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987), see also
Strickler v. Greene, Cert. granted and heard on March 3, 1999.
United States v. Bagley, 473 U.S. 667,676 (1985)
Wheeler v. State, 42 Md. 563, 570
Vogel v. State, 163 Md. 267, 162 A. 705. [373 U.S. 83, 90]

Edward M. Conk respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished. The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was September 29, 1998

A timely petition for rehearing was denied by the United States Court of Appeals on the following date December 22,1998, and a copy of the order denying rehearing appears at Appendix C.

An extension of time to file the petition for a writ of certiorari was granted to and including April 21, 1999 on March 10, 1999 in Application No. A- 8755..... .

The jurisdiction of this Court is invoked under 28 U.S.C. SS 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Section 2 of Article III, concerns jurisdiction of the courts. Federal Rules of Criminal Procedure apply.

STATEMENT OF THE CASE

On June 3, 1998, Petitioner Edward M. Conk and co-defendant Thomas A. Wilkinson, III by counsel Paula M. Junghans and Jerry Zerkin were granted a hearing before Judge Merhige in the United States District Court for the Eastern District of Virginia on supplemental motion based on new evidence. At the hearing Judge Merhige heard oral arguments from Ms. Junghans and Mr. Zerkin, as well as from the government AUSA David Maguire. The issue at bar was whether or not the government was required to turn over evidence to the defendants before trial, that was the summary evidence (exculpatory or not) that made up exhibit MF-4. And by not doing so violated the defendants' rights under due process and henceforth lead to the defendants Brady claim.

> Suppression by the prosecution of evidence favorable to an accused that has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Pp. 86-88. *Brady v. Maryland*, 373 U.S. 83 (1963) Certiorari to the Court of Appeals of Maryland. No. 490 Argued March 18-19, 1963. Decided May 13, 1963.

Background of the original trial

In December 1995, Petitioner Edward M. Conk and co-defendant Thomas A. Wilkinson, III were tried before a jury in the United States District Court for the Eastern District of Virginia. During trial the government argued and presented what they said was summary evidence in the form of a chart, later to be know as exhibit MF-4, to the jury, through the testimony of expert witness Raymond Pertouka[1],

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whom complied all of the financial records, and his company was responsible for the collections from the defendants' former companies.

In the government's eyes exhibit MF-4 would prove to the jury that Health Line Inc. a subsidiary of Blue Cross Blue Shields of Maryland, (the victim) loss 3.6 million dollars, because the two defendants "lie, cheat and stole" the funds on this exhibit. Department of Justice Attorney William Finch, would tell the court that all the evidence that supports exhibit MF-4 are in the 1,100 exhibit, and point to said documents behind the governments desk. Thereby inferring that all the jury had to do was review the exhibit MF-4, and see how all the money was stolen. While Prosecutor AUSA David Maguire during trial and closing arguments would argue that exhibit MF-4 would show just how guilty the defendants were, by how much money the victim lost.

> What is at issue here is whether the [capital] judgement against petitioner can, in fact be treated as reliable, given the Commonwealth's suppression of evidence that would have devastated the credibility of the Commonwealth's purportedly disinterested "eyewitness," *Strickler v. Greene*, Cert. granted and heard on March 3, 1999.

The same could be said for the testimony of expert witness Raymond Pertouka. For the Fourth Circuit Court of Appeals clearly points out that exhibit MF-4 became the centerpiece of the prosecution. Without the documents there could be no rebuttal expert witness called by the defense.

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[1] Not only did Mr. Pertouka act as an expert witness, government agent he also sat at the prosecution side through out the trial, acting as key counsel. The defense counsel strongly objection to Mr. Pertuoka presence. Mr. Pertuoka is an attorney, CPA and President of Maryland First Financial Services, Inc. (hence the initials MF on the exhibit)

During trial, on cross by defense counsel James Comey[2] government agent and expertise witness Raymond Pertouka would testify that all collections that were to come in had been paid, and documented in summary exhibit MF-4. And as far as he believed no other funds were to be collected or applied in this case to the credit of the defendants, or their former companies. However, this was not true, and the evidence uncovered by Ms. Junghans, petitioner counsel proved that the 3.6 million dollars was misrepresented.

Later, for the record of appeal AUSA David Maguire, stated that under rule 1006 that 98% of the summary documents for the exhibits are here. And Judge Merhige, would rebut with, "will they all are required to be here".

This brings us to the first question –***Whether the government was required by law to turn over to defendants all evidence, whether exculpatory or not?***

The government during trial stated that all of the evidence was in the 1,100 exhibits. Therefore, the government must have thought that they were required to turn over the evidence whether exculpatory or otherwise. Again, at the appellate court, the government stated and passionately argued that all the evidence was in the courtroom during trial.

But then in the government's reply brief they changed their answer, and stated that the evidence was not in the 1,100 exhibits, but drew a fine line that the documents were in the courtroom – "in Raymond Perutoka's assistant's briefcase"[3]. The jury did not hear this fact, nor were they able to determine whether the government was telling the truth during trial - without prejudice or passion to win the case. The jury took what the government said as truth, that

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[2] Counsel for Mr. Wilkinson. Petitioner counsel was Dennis Dohnal.

[3] Are we to believe that Mr. Pertouka assistant and his brief case was in the courtroom the entire time, even thou he was not apart of the trial, and not require to be there.

the victim lost 3.6 million dollars, but neglected to say that any money lost was personally guarantee by defendants. The jury didn't get to hear that the restitution came to 1.7 million dollars, or a rebuttal witness, which gave an affidavit to defense counsel, during a hearing which showed that the actual amount was 500 thousand dollars or less, because collections were still coming in that should be applied in favor of the defendants, affidavit of William (Bill) Dacey[4] .

Next question. ***Whether the lower court erred by not enforcing the subpoena granted for said evidence, once the court was made aware that the evidence was not in the courtroom?*** AND- ***Does the law require a summary exhibit's supporting documents to be in evidence?***

During trial, had the district court stopped the trial when the prosecution and defendants did not agree that the evidence was in the courtroom, OR defense counsel[5] had never seen all of the evidence required by the subpoena the jury would not had been allow to hear the government's allegations that the defendants stole money from the victim. Therefore, the judge could (and should) have had the testimony of the expert witness and his summary exhibit stricken from the record.

> "Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the innocence or guilt of the accused." 229 Md., at 383, 183 A. 2d, at 365. The cases cited make up a long line going back nearly a century. *Wheeler v. State*, 42 Md. 563, 570, stated that instructions to the jury were advisory only, "except in regard to questions as to what shall be considered as evidence." And the court "having such right, it follows of course, that it also has the right to prevent counsel from arguing against such an instruction."

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[4] Bill Dacey is a CPA and a former FBI agent.

[5] Affidavit of defense counsel Dennis Dohnal.

Bell v. State, 57 Md. 108, 120. And see *Beard v. State*, 71 Md. 275, 280, 17 A. 1044, 1045; *Dick v. State*, 107 Md. 11, 21, 68 A. 286, 290. Cf. *Vogel v. State*, 163 Md. 267, 162 A. 705. [373 U.S. 83, 90]

Furthermore, the appellate court could have granted a new trial based on the judge's statement, during the hearing, "that they were required to be here, some things you are duty bound to give, the defense does not have to ask for them". Or in the case of the defendants' trial were Judge Merhige said, "let me make it clear, if I find they are not here, then we start over". How else was the appellate court to interpret the judges statement? Clearly, not by claiming harmless error.

What is the proper standard in Federal Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence, when the jury relies on documents that were not placed into evidence, for conviction of guilt or innocence.

The government during the June 3 hearing on new evidence, before Judge Merhgie stated their fifth different answer to the same question, Were the support records to MF-4 turned over to the defendants, were the documents in evidence, and in the courtroom? The government finally admitted that Raymond Pertuoka did have the documents, in his office, and they were not turned over to the defense, they were not in evidence or in the courtroom. The government's latest story is that they were not required to turn over critical evidence, "because Mr. Pertouka was wearing a different hat"[6]. An argument must be raised that as soon as Pertuoka became a government agent, the government was required to turn over the documents to the defendants. Petitioner moved the trial court for a new trial based on the newly discovered evidence that had been suppressed by the prosecution.

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[6] Brief of Government

Evidence is exculpatory if it is favorable to the accused" (*Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987), a determination that turns on what "competent counsel" could have accomplished with the evidence. *Kyles,* 514 U.S. at 441; see also *United States v. Bagley*, 473 U.S. 667,676 (1985) (Brady inquiry focuses on impact evidence would have "if disclosed and used effectively"). This court made clear 40 years ago that evidence that impeaches a prosecution witness clearly is favorable in the relevant sense, since "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." Naupe v. Illinois, 360 U.S. 264, 269 (1959). For that reason, it has long been established that "[I]mpeachment evidence *** falls within the Brady rule." *Bagley,* 473 U.S. at 667;

REASONS FOR GRANTING THE PETITION

The Petitioner, Edward M. Conk ask this Court to grant A Writ of Certiorari for the following reason;

The United States court of appeals entered a decision in conflict with the decision of another United States court of appeals on the same issue. For the court to apply the same standard time and again, in any district.

Violation of the Due Process Clause of the Fourteenth Amendment. United States Court of Appeals held that suppression of the evidence by the prosecutor denied petitioner due process of law.

The question remains whether petitioner was denied a constitutional right when the United States court of appeals restricted their opinion to the question of harmless error, and not to the finding of facts which have been supported in *Brady v. Maryland.*

In a jury trial in Federal Court, where the jury is the judge of both the law and the facts but the court passes on the admissibility of the evidence. -When has the court fulfilled its duties to the jury that allows them to determine right from wrong, and whether a crime was committed. What I ask for this court to decide is at what point has the court fulfilled its duties. When it is the court that passes along to the jury the admissibility of the evidence. Is it right or wrong for the judge in a case to determine what evidence will or will not go with the jury for deliberation. At what point must the court intervene and call for findings of fact; either the evidence is in the court room and the prosceution can produce said documents, or they can not and must not be barred from the use of the information they would had produced. Whether the information is in the form of a summary exhibit, chart, or oral argument is ilrilavent, it can not allow it to be used.

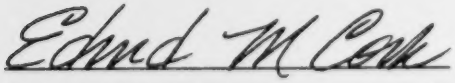
(a) Suppression by the prosecution of evidence favorable to an accused that has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

If the prosecution is allowed to side step this basic right of the defendant what will be next? - At what point should the court ask for both sides to prove their point before going forward with a trial? - If the jury is to use the evidence to convict the defendants of guilt or innocence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Edward M. Conk

May 25, 1999

APPENDIX A

APPENDIX A

UNPUBLISHED

UNITED STATED COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-6857

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

versus

THOMAS A. WILKINSON, III,

Defendant – Apellant.

No. 98-6861

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

versus

EDWARD M. CONK,

Defendant – Appellant.

Appeals from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., Senior District Judge. (CR-95-68)

Submitted: September 10, 1998
Decided: September 29,1998

Before MURNAGHAN, MICHAEL, and MOTZ, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Gerald Thomas Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia; Paula Marie Junghans, MARTIN, JUNGHANS, SNDER & BERNSTEIN, P.A., Baltimore, Maryland, for Appellants. David T. Maguire, Assistant United States Attorney, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Appellants appeal from the district court's order denying their supplemental motion for a new trial based on their allegations of newly discovered evidence and the Government's violation of the disclosure requirements of Brady v. Maryland, 373 U.S. 83 (1963). We have reviewed the record and the district court's opinion and find no reversible error, Accordingly, we affirm on the reasoning of the district. UNITED STATES v. Wilkinson, No. CR-95-68 (E.D. Va. June 4, 1998). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

UNITED STATES OF AMERICA,)
)
V.)
) No. 3:95CR68
THOMAS A. WILKINSON III, and)
EDWARD M. CONK,)
)
Defendants.)

ORDER

This matter is before the Court on Defendants' supplemental Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Defendants contend that newly-discovered evidence requires the granting of a new trial on the interests of justice. The United States of America, by its representative, David T. Maguire, Assistant United States Attorney, opposes the motion. On June 3, 1998, the Court took evidence and heard argument on the motion.

The Court finds that Defendants' present motion is simply a restatement of the same arguments unsuccessfully raised in their initial Motion for New Trial, on appeal to the United States Court of Appeals for the Fourth Circuit, and in their Petition for Rehearing and Rehearing En Banc.

Once again, as it did back in July and September of 1996[1] Furthermore, the Court is not satisfied that the matters about which Defendants complain arises from newly-discovered evidence. Nor is the Court satisfied that it involves matters which cast any doubt on the legal appropriateness of the jury's verdict of guilty.

Therefore, upon due consideration, and for the reasons states from the bench, it is ADJUDGED and ORDERED that Defendants; motion be, and the same is, hereby DENIED.

It is FURTHER ORDERED that all remaining motions not previously ruled on by the Court are DENIED AS MOOT.

Let the Clerk send a copy of this Order to all counsel of record.

s/ Judge Robert R. Merhige, Jr.
UNITED STATES DISTRICT JUDGE

DATE: June 4, 1998

FILED STAMP JUN 4 1998

[1] The court rejected Defendants' initial Motion For New Trial in open court on July 15,1996, and reaffirmed its ruling in an Order dated September 3,1996. See Docket No. 78, 96.

APPENDIX C

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
December 22, 1998

No. 98-6861
CR-95-68

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

EDWARD M. CONK
Defendant - Appellant

On Petition for Rehearing and Rehearing En Banc

Appellant, through counsel, filed a motion for extension of time within which to file a rehearing petition and request for leave to supplement the filing. Appellant, pro se, filed a petition for rehearing and suggestion for rehearing en banc.

The petition for rehearsing and suggestion for rehearsing in banc were submitted to this Court. The motion for an extension and to supplement the filing were submitted to the panel.

As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied. The motion for extension are also denied.

For the Court,

/s/Patricia S. Connor
CLERK